

2000

Paul Blackner v. State of Utah, Department of Transportation and the Utah Department of Transportation and City of Alta : Brief of Appellee

Utah Supreme Court

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PAUL BLACKNER,

Plaintiff/Appellant,

VS.

STATE OF UTAH, DEPARTMENT
OF TRANSPORTATION, and the
UTAH DEPARTMENT OF
TRANSPORTATION and CITY OF
ALTA,

Defendant/Appellee.

Case No.: 20000906 SC

Priority 15

**APPEAL FROM A FINAL JUDGMENT AND ORDER
HONORABLE WILLIAM B. BOHLING
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

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FILED

MAR 20 2001

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL BLACKNER,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	Case No.: 20000906 SC
STATE OF UTAH, DEPARTMENT)	
OF TRANSPORTATION, and the)	
UTAH DEPARTMENT OF)	
TRANSPORTATION and CITY OF)	Priority 15
ALTA,)	
)	
Defendant/Appellee.)	

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings are identified in the caption on appeal.

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JURISDICTIONAL STATEMENT

Appellee, the Town of Alta, agrees with the jurisdictional statement of Appellant, Paul Blackner (hereinafter "Blackner").

ISSUES PRESENTED FOR APPEAL

1. Did the trial court correctly grant the Town of Alta's Motion for Summary Judgment based on Utah Code Ann. §63-30-10(11)?

Standard of Review:

A grant of summary judgment is reviewed for correctness. Collins v. Sandy City Board of Adjustment, 16 P.3d 1251, 1253 (Utah App. 2000). Additionally, "[M]atters of statutory construction are questions of law that are reviewed for correctness." Platts v. Parents Helping Parents, 947 P.2d 659, 661 (Utah 1997). This issue was preserved in the trial court in the Town of Alta's Motion for Summary Judgment (R. 180) and the trial court's order granting summary judgment (R. 280-81).

2. Did the trial court correctly grant the Town of Alta's Motion for Summary Judgment based on Utah Code Ann. §63-30-10(13)?

Standard of Review:

A grant of summary judgment is reviewed for correctness. Collins v. Sandy City Board of Adjustment, 16 P.3d 1251, 1253 (Utah App. 2000). Additionally, "[M]atters of statutory construction are questions of law that are reviewed for correctness." Platts v. Parents Helping Parents, 947 P.2d 659, 661 (Utah 1997). This issue was preserved in the

trial court in the Town of Alta's Motion for Summary Judgment (R. 180) and the trial court's order granting summary judgment (R. 280-81).

DETERMINATIVE STATUTES

The following statute's interpretation is determinative or of central importance to this appeal:

Section 63-30-10, Utah Code Annotated, as amended (1996)

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

* * *

(11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;

* * *

(13) the management of flood waters, earthquakes, or natural disasters;

* * *

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

This is an action for personal injuries sustained by Blackner when he was caught in an avalanche in Little Cottonwood Canyon. Blackner brought suit against the Utah Department of Transportation and the Town of Alta, alleging that employees of these governmental entities were negligent for stopping traffic under a slide area and that their

negligence was the cause of his injuries. (R. 139). Both defendants moved for summary judgment on the grounds that the Utah Governmental Immunity Act, Utah Code Ann. §63-30-1 et seq., provided them with immunity. In particular, Utah Code Ann. §63-30-10(11), provides governmental entities with immunity for any injury which arises out of, in connection with, or results from, any natural condition on publicly owned land. The Town of Alta argued that the avalanche was a natural condition on publicly owned land. (R. 180). Blackner argued that an avalanche is a "natural phenomenon" not a natural condition, so the statute did not apply. (R. 233-234).

Additionally, the Town of Alta argued that it was entitled to immunity under Utah Code Ann. §63-30-10(13), which grants governmental entities immunity for any injury which arises out of, in connection with, or results from, the management of a natural disaster. The Town of Alta argued that the first avalanche constituted a natural disaster that its deputy was managing when the second avalanche released. (R. 180-81). In response, Blackner argued that the first avalanche was "merely a spectacle of nature" and was not a natural disaster because it caused no actual harm or damage. (R. 232).

At the hearing, the trial court granted summary judgment to both defendants, finding that they were immune from Blackner's suit under both Utah Code Ann. §63-30-10(11) and (13). (R. 232). On appeal, Blackner has addressed only the trial court's award of summary judgment under Utah Code Ann. §63-30-10(13).

STATEMENT OF FACTS

The following facts were either assumed to be true in the court below or were uncontroverted in the record:

On March 14, 1998, at 2:19 p.m., Dave Madera (“Mr. Madera”), an avalanche forecaster with the Utah Department of Transportation, was notified that an avalanche in Little Cottonwood Canyon had hit State Route 210 covering the down hill lane of traffic. (R. 164-65, ¶¶1-5). State Route 210 is a two-lane road that runs from Salt Lake City, through the bottom of Little Cottonwood Canyon, ending at the Town of Alta. (R. 165, ¶3). Kevin Payne (“Deputy Payne”), a Deputy Marshal for the Town of Alta, was also notified of the avalanche at 2:19 p.m. and arrived at the scene approximately three minutes later. (R. 192-93, ¶¶3-4).

Upon his arrival at the scene of the avalanche, Deputy Payne became concerned that vehicles in both the uphill and downhill lanes would attempt to drive around the avalanche debris at the same time and collide head on. Therefore, he began to control traffic around the avalanche debris by directing each lane of traffic to take turns using the open lane. (R. 178, ¶4).

Several minutes after Deputy Payne arrived at the site of the avalanche he was met by Mr. Madera. They discussed the situation, including the possibility of using a front-end loader from Snowbird Ski Area to remove the avalanche debris from the road. Together they contacted Snowbird and arranged for the front-end loader. (R. 193, ¶6).

Mr. Madera then drove down the canyon to see if other avalanche activity was occurring in the lower canyon slide areas. (R. 165, ¶6).

Approximately 15 minutes after Deputy Payne and Mr. Madera called in the request, the front-end loader arrived at the scene of the avalanche and began to push avalanche debris off the side of the road. While the loader was working, traffic could not safely negotiate around both the loader and the debris. Therefore, vehicles in both lanes of travel were stopped to allow the loader to clear the road. (R. 178, ¶5).

Approximately five to ten minutes after the loader began to clear the debris, Deputy Payne received a radio call from Mr. Madera. Mr. Madera explained that he had returned from examining areas down the canyon and was in one of the vehicles waiting in the uphill lane. Mr. Madera indicated that he had begun to worry about the safety of his location and asked how much longer the loader would be working. Deputy Payne advised Mr. Madera that the loader was taking its last scoop. Several seconds later another avalanche, emanating from a different location, tumbled onto the road and struck some of the vehicles stopped in the uphill lane, including plaintiff's vehicle and Mr. Madera's vehicle, pushing several vehicles off the road and down into the east end of the Tanner's Flat Campground. Plaintiff was injured as a result of this second avalanche. (R. 178-79, ¶6). Mr. Madera was also caught in this second avalanche. (R. 166, ¶10).

The second avalanche hit at 2:53 p.m. (R. 166, ¶8). The entire episode, from the time the first avalanche hit the road to the time of the second avalanche, was only 34 minutes. (R. 166, ¶9).

The area north of the canyon road, including the White Pine Chutes where both avalanches originated, is public land designated as the Twin Peaks Wilderness Area, which is managed by the National Forest Service as part of the Wasatch-Cache National Forest. (R. 179, ¶7). The avalanches were caused by natural forces and were not triggered by any avalanche control efforts being conducted in the canyon that day. (R. 166, ¶9).

SUMMARY OF ARGUMENTS

In section I of its Argument, the Town of Alta explains that the trial court correctly found that it is entitled to immunity from Blackner's lawsuit under the Utah Governmental Immunity Act. The Town of Alta moved for summary judgment on the grounds that it was immune from Blackner's suit under Utah Code Ann. §63-30-10(11) and (13), and the district court granted this motion under both provisions. However, in the Appellant's brief, Blackner did not address the trial court's order granting summary judgment based on Utah Code Ann. §63-30-10(11). This alone mandates upholding the trial court's order. Despite Blackner's failure to address this issue, the Town of Alta explains below that the trial court was correct in finding that Blackner's injuries were proximately caused by natural conditions on public land and that the Town of Alta, therefore, was entitled to immunity.

In his Appellate Brief, Blackner argues that the trial court erred when it granted summary judgment on the basis that the defendants were involved with managing a natural disaster – the first avalanche. Blackner asserts that the first avalanche was not a

natural disaster. The Town of Alta counters that the first avalanche was correctly found to be a natural disaster because it threatened to cause injury or death by blocking a lane of traffic and forcing vehicles moving in opposite directions to share one lane. Under the definition of “disaster” proffered by Blackner, the threat of injury or death is sufficient to constitute a disaster. Therefore, the trial court was correct in finding the Town of Alta was immune from Blackner’s suit and granting its Motion for Summary Judgment on this ground.

In section II of its Argument, the Town of Alta points out that in his Appellant’s Brief, Blackner has attempted to raise issues that were not brought before the trial court. The Town of Alta argues that Blackner has waived such arguments by failing to raise these issues before the trial court. Even if this court considers Blackner’s new issues, these issues are without merit.

ARGUMENT

INTRODUCTION

In its Motion for Summary Judgment, the Town of Alta argued that it was immune from Blackner’s suit under Utah Code Ann. §63-30-10(11), since the injury suffered by Blackner arose out of a natural condition on publicly owned lands. (R. 180). Blackner responded in his memorandum opposing summary judgment that the avalanche was a “natural phenomenon,” not a “natural condition” which would afford the Town of Alta immunity. (R. 233-34). The Town of Alta, in its reply memorandum, argued that it

did not matter whether the avalanche was called a "condition" or a "phenomenon," it was still entitled to immunity under Utah Code Ann. §63-30-10(11). (R. 251-52).

At the hearing on the motion for summary judgment, the trial judge said: "[I]t's the Court's view . . . that the avalanche is a natural phenomenon, it is certainly a natural condition of the land" (R. 294 (Transcript of Hearing, p. 16)) (emphasis added). Finally, in the Order of Summary Judgment from which Blackner appeals, the trial court ordered: "1. That the defendants [Appellees] respective motions for summary judgment are granted pursuant to U.C.A. §63-30-10(11) and (13)." (R. 81 (Order of Summary Judgment)). Despite the fact that the issue of immunity under this subsection was fully argued below, and the trial court clearly granted summary judgment based in part on Utah Code Ann. §60-30-10(11), Blackner's brief fails to challenge this as a basis for his appeal. *See* Appellant's Brief, "Statement of the Issues," p. 2. This alone is a sufficient reason for this Court to uphold the trial court's decision.

In his brief, Blackner repeatedly makes the erroneous argument that: "The singular issue on this appeal is that the lower court erred by concluding, as a matter of law, that employees of UDOT and the City of Alta were involved in the 'management of a natural disaster' prior to and at the time of the avalanche which hit the Appellant." Appellant's Brief, p. 19. *See also* Appellant's Brief, p. 10, ("This [management of natural disaster] was the singular basis for the lower court's ruling" (emphasis in original)).¹ As

¹ To support his claim that the trial court's only basis for granting the motions for summary judgment was an erroneous interpretation of a natural disaster, Blackner clearly misquotes the trial court on pages 10-11 of his Appellate Brief. The actual quote from the trial court, with the portions omitted by Blackner underlined, reads as follows:

noted above, the trial court granted the Town of Alta's Motion for Summary Judgment based upon Utah Code Ann. §63-30-10(11) and (13). (R. 281). Blackner has failed to claim any error in the trial court's decision finding the Town of Alta immune from plaintiff's suit due to plaintiff's injury arising out of, in connection with, or resulting from a natural condition on publicly owned or controlled lands. Accordingly, Blackner has waived any argument that the trial court erred in granting summary judgment on this basis. State v. Dunn, 850 P.2d 1201, 1220 fn. 17 (Utah 1993). The trial court's decision granting summary judgment should be upheld on this basis alone.

I. THE TRIAL COURT CORRECTLY RULED THAT THE TOWN OF ALTA IS IMMUNE FROM THE PLAINTIFF'S LAWSUIT UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT.

A governmental entity's liability for injuries caused by it, or its employees, is governed by the Utah Governmental Immunity Act, Utah Code Ann. §§63-30-1 et seq. (the "Act"). Under the Act, "all governmental entities are immune from suit for any injury which results from the exercise of a governmental function," Utah Code Ann. §63-30-3(1). The Town of Alta, as a political subdivision of the State of Utah, is a governmental entity entitled to immunity under the Act when exercising a governmental function. Utah Code Ann. §63-30-2(3) and (7).

. . . it's the Court's view that the intention as communicated by the legislature in this statute is that – that the avalanche is a natural phenomenon, it is certainly a natural condition of the land and that the – a disaster is a situation that causes widespread damage to property that results from natural phenomenon. And in the Court's view this sort of condition would follow in the description of "widespread damage" and would therefore be within the statute and would allow the immunity to the entities that are sued here as the Defendants." (R. 294 (Transcript of Hearing, p. 16, lines 9-18)). The Court undeniably found that the avalanche that caused the plaintiff's injury was a natural condition on publicly controlled land.

A governmental function is defined as: “[A]ny act, failure to act, operation, function, or undertaking of a governmental entity . . .” Utah Code Ann. §63-30-2(4)(a). Further, “[a] ‘governmental function’ may be performed by any . . . employee . . . of a governmental entity.” *Id.* at (4)(b). On March 14, 1998, Deputy Payne, an employee of the Town of Alta, was exercising a governmental function when he was assisting in the management of a natural disaster by controlling traffic around the debris of the first avalanche. Therefore, the Town of Alta is entitled to immunity under the Act for Deputy Payne’s actions, or failure to act.

Blackner has alleged that he has suffered injury proximately caused by the negligent acts or omissions of employees of the Town of Alta and the State of Utah. The Act waives immunity from suit “for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from: . . . (11) any natural condition on publicly owned or controlled lands, . . . [or] (13) the management of flood waters, earthquakes, or natural disasters; . . .” Utah Code Ann. §63-30-10(11) and (13) (emphasis added). As explained below, the trial court correctly found that the Town of Alta is immune from suit under these two exceptions.

A. The Town Of Alta Is Immune From Suit Because Blackner's Injury Arose Out Of A Natural Condition On Publicly Owned Or Controlled Lands.

As discussed more fully above, Blackner has failed to appeal the trial court's order granting summary judgment based upon Utah Code Ann. §63-30-10(11). This alone is sufficient basis for this Court to uphold that decision. Furthermore, the trial court was

correct when it found that the Town of Alta was immune from Blackner's suit under Utah Code Ann. §63-30-10(11) since his injury arose out of, in connection with, or resulted from a natural condition on public land.

It is undisputed that the avalanches at issue in this case were natural conditions. Snow pack stability or instability is a natural condition in mountainous areas worldwide. Similarly, the avalanches that spawn from such instability are also natural conditions found in such areas, including Utah's Wasatch Mountains. Although such conditions can be triggered by human action, both purposeful and accidental, there is no evidence in this case that the avalanche activity in the White Pine Chutes on March 14, 1998, was due to anything other than natural conditions. (*See* R. 269) ("On March 14, 1998, no avalanche control efforts were occurring in the Little Cottonwood Canyon. Therefore, the avalanches on that day were the result of a natural condition which released naturally."). Moreover, it is also undisputed that the land on which the avalanches occurred is designated as wilderness, which is public land managed by the National Forest Service as part of the Wasatch-Cache National Forest Service. (R. 179).

Plaintiff's injuries clearly arose out of, in connection with, or resulted from the natural avalanches that occurred in Little Cottonwood Canyon. The evidence presented below amply supports the trial court's finding that: "[T]he avalanche is a natural phenomenon, it is certainly a natural condition of the land" (R. 294 (Transcript of Hearing, p. 16)). As such, the trial court correctly ruled that the Town of Alta was immune from Blackner's suit on the basis that Blackner's injuries arose out of, in connection with, or resulted from the natural condition of publicly owned lands.

Accordingly, even though Blackner failed to appeal this basis of the lower court's ruling, the decision of the trial court was correct and should be upheld.

B. The Town Of Alta Is Also Immune From Suit Because Deputy Payne Was Assisting With The Management Of A Natural Disaster.

The trial court also found that the first avalanche was a natural disaster, and concluded that the Town of Alta was immune from suit for Deputy Payne's traffic control efforts in managing this natural disaster. (R. 281 (Transcript of Hearing, p. 16)). This conclusion by the trial court is supported by the undisputed evidence and should be upheld.

Under the Utah Governmental Immunity Act, a governmental entity retains immunity from suit when the “injury arises out of, in connection with, or results from: . . . (13) the management of . . . natural disasters.” Utah Code Ann §60-30-10(13). A few minutes prior to the time that Blackner sustained his injuries, Deputy Payne responded to the scene of a natural disaster – an avalanche that was then covering half of the road and endangering motorists. The threat of injury, loss of life, or loss of property caused by traffic moving up and down the canyon around an avalanche while sharing a single lane was obvious. Deputy Payne undertook management of this natural disaster by enacting traffic control measures to protect the public and by mobilizing heavy equipment to remove the dangerous obstacle.

In his brief, Blackner cites Utah Code Ann. §63-5a-2(1), which defines a “disaster.” Blackner argues that the first avalanche, which blocked the downhill lane of traffic on a busy canyon road, “did not fit the definition of a ‘disaster’ since it did not

create a situation causing, or even threatening to cause (1) widespread damage; (2) social disruption; (3) injury; (4) loss of life; or (5) loss of property.” Appellant’s Brief, p. 15. This argument completely ignores the relevant language of the statute that defines a disaster under Utah law. By quoting that definition below, with the emphasis of underlining, the court can easily see that the first avalanche meets the statutory definition of a disaster:

“Disaster” means a situation causing, or threatening to cause, widespread damage, social disruption, or injury or loss of life or property resulting from attack, internal disturbance, natural phenomenon or technological hazard.

Utah Code Ann. §63-5a-2(1) (emphasis provided).

The first avalanche was unquestionably a disaster under this undisputed definition. Blackner argues that this avalanche was not a disaster since there was no actual “widespread damage.” However, widespread damage is not the only requirement for a situation to amount to a disaster under the above definition. Nor is actual injury or actual loss of life required. Under the above-cited definition of disaster, the threat of injury or loss of life caused by natural phenomenon is sufficient to constitute a “disaster.”

As explained in point “A,” supra, both avalanches were natural phenomena. By blocking the downhill lane of traffic, the first avalanche clearly threatened to cause injury or loss of life by forcing downhill traffic to use the same lane of traffic as the uphill traffic. Deputy Payne was not required to wait until a head-on collision caused actual injury or death before taking action to manage the disaster. The first avalanche was a disaster that Deputy Payne was managing when Blackner was injured in a second

unexpected avalanche. Therefore, the trial court correctly determined that the first avalanche was a natural disaster, and concluded that Deputy Payne was involved in the management of that natural disaster when Blackner was injured.

Throughout his brief, Blackner downplays the significance of Deputy Payne's actions following the first avalanche, referring to these actions as "simple traffic control and nothing further." Appellant's Brief, p. 18. However, traffic control around the avalanche, and efforts to remove the avalanche debris and re-open the buried lane of the road, were indispensable aspects of managing this disaster. This should not be surprising since traffic control and debris cleanup are typically important parts of managing any natural disaster. Blackner simply is incorrect in his argument that Deputy Payne's actions were too minor or unimportant to constitute management during a disaster.

As part of his argument that the trial court erred in determining that the first avalanche was a natural disaster which afforded the defendants governmental immunity from his suit, Blackner cites the case Nelson By and Through Stuckman v. Salt Lake City, 919 P.2d 565 (Utah 1996). However, in his brief, Blackner fails to explain how the Nelson case relates to the case at hand. Regardless, the Nelson case is easily distinguished from the case at hand. In Nelson, the Jordan River was a constant and known hazard. The government knew that any time a child wandered too close to the river, the child could fall in and drown. In the case at hand, the second avalanche was not a constant hazard. It was only dangerous on those rare occasions when the snow dislodged, without human intervention, with sufficient intensity to cover the road below. At all other times, traffic could move up and down the canyon safely. Prior to its release,

the second avalanche was an unknown hazard. This is proven by the fact that Mr. Madera, the avalanche forecaster for UDOT, was parked below the slide area when he notified Deputy Payne of the potential danger and was himself caught in the second avalanche seconds later.

In Nelson, the government erected a fence, a permanent solution to protect people from the permanent hazard posed by the Jordan River. In the case at hand, Deputy Payne was attempting to manage and provide an immediate solution to a temporary hazard – the debris left by the first avalanche – when Blackner was struck by a second unexpected avalanche. In Nelson, the government was negligent in maintaining the fence, and a child was able to get through the fence to the Jordan River. The fence had been erected to protect people from this very hazard. In the case at hand, Deputy Payne's efforts were designed to prevent motorists from running into each other, a hazard very different from the avalanche that actually injured Blackner. Accordingly, Nelson is clearly distinguishable from the case at hand and does not support Blackner's claim that the Town of Alta is not protected from his suit by governmental immunity.

The undisputed evidence supports the trial court's determination that the first avalanche was a natural disaster under Utah law and that Deputy Payne was helping to manage that natural disaster. Therefore, the trial court was correct in concluding that the Town of Alta was immune from suit under Utah Code Ann. §63-30-10(13).

II. BLACKNER IS ATTEMPTING TO RAISE ISSUES FOR THE FIRST TIME ON APPEAL.

In his brief, Blackner, for the first time, raises a number of issues that were not raised or argued before the trial court. By failing to raise these arguments before the trial court below, Blackner has waived any right to present them on appeal. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 800-801 (Utah 1991). Blackner's attempts to introduce arguments for the first time on appeal are inappropriate and such arguments should be disregarded. For example, Blackner now claims "policy considerations" warrant ignoring the clear provisions of the Utah Governmental Immunity Act (Appellant's Brief, p. 20); that the Town of Alta knowingly placed him in harm's way (Appellant's Brief, p. 18); and that the Town of Alta neglected its duty to maintain roads in a safe condition (Appellant's Brief, p. 12). These arguments are improper because they were not raised before and there is no legal basis for such arguments.

Even if this Court chooses to consider these inappropriate arguments, they lack merit. For example, there is no evidence to suggest that Deputy Payne knew that Blackner was stopped in harm's way. Additionally, Blackner ignores the plain language of the Utah Governmental Immunity Act which explains that a claim for failure to maintain roads is trumped by the two exceptions to immunity discussed herein. See Utah Code Ann. §63-30-8 and compare with §§63-30-10(11) and (13) (immunity for dangerous condition of highway is waived "unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10"). Accordingly, none of the new

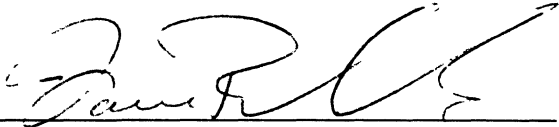
issues raised by Blackner are meritorious and should not affect the decision of the district court.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that the court affirm the district court's judgment.

Respectfully submitted this 28 day of March, 2001.

CHRISTENSEN & JENSEN, P.C.

By 

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George W. Burbidge


Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2001, two true and correct copies of Appellee's Brief was mailed, postage prepaid, to the following persons:

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ADDENDUM

1. Transcript of Hearing
2. Order of Summary Judgment

Tab 1

NOV 03 2000

IN THE THIRD JUDICIAL DISTRICT COURT, FOR S. Quinn

Deputy Clerk

SALT LAKE COUNTY, STATE OF UTAH

* * *

ORIGINAL

PAUL BLACKNER,

Plaintiff,

-vs-

STATE OF UTAH, et al.,

Defendants.

Case No. 990906368

HEARING, 8-28-00

BE IT REMEMBERED that on the 28th day of August,

2000, this cause came on for hearing before the HONORABLE

WILLIAM B. BOHLING, District Court, without a jury, in the Salt

Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the Plaintiff:

TAD D. DRAPER
Attorney at Law

For the Defendants:

SANDRA L. STEINVOORT
Attorney at Law

DAVID RICHARDS
Attorney at Law

Court Transcriber: BILLIE WAY, CCT

IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

PAUL BLACKNER,)
Plaintiff,)
-vs-) Case No. 990906368
STATE OF UTAH, et al.,) HEARING, 8-28-00
Defendants.)

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2000, this cause came on for hearing before the HONORABLE
WILLIAM B. BOHLING, District Court, without a jury, in the Salt
Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the Plaintiff: TAD D. DRAPER
Attorney at Law

For the Defendants: SANDRA L. STEINVOORT
Attorney at Law
DAVID RICHARDS
Attorney at Law

Court Transcriber: BILLIE WAY, COT

PROCEEDINGS.

THE COURT: This is the matter of Paul Blackner v. State
of Utah, et al; Case No. 990906368.

Counsel, will you enter your appearances, please.

MR. DRAPER: Your Honor, Tad Draper here on behalf of Paul
Blackner.

MS. STEINVOORT: Sandra Steinvoort on behalf of the State
of Utah, Department of Transportation.

MR. RICHARDS: Dave Richards on behalf of the Town of
Alta.

THE COURT: Now, there are two motions for summary
judgment. They appear to me to raise very similar issues.

Mr. Draper, do you see a distinction or should I just have
the Defendants argue their motions --

MR. DRAPER: I don't see a distinction. It's their
motions, but I think that they're all the same issues.

THE COURT: All right. Let's go ahead. I'll hear from
the Defendants in this case, and whoever wishes to speak first
may proceed, and then I'll (Inaudible).

MS. STEINVOORT: Thank you, Your Honor. If may I approach
for just a moment? (Hanging).

Mr. Richards and I were discussing this earlier. We
assume that the Court's pretty familiar with the facts of this
case, and I'm not sure how much you want us to go into it other
than say that there was an avalanche that occurred in Little

Cottonwood Canyon in March of 1998, and Mr. Blackner was
injured along with other people as a result of that avalanche.

Our argument today and our motion is based on the argument
of immunity, which we feel are entitled -- it isn't -- is
available to us because of 63-30-10 (11), which talks about:

"Immunity is preserved for conditions
which arise out of a natural condition on
a public land."

I think the facts are fairly undisputed in terms of a
situation on that particular day. It is a state road.
U.D.O.T. has the sole authority to close that road. An
avalanche occurred. If you look at the diagram here, White
Pine Chute, Number 3, which traveled to one lane of traffic on
the road, preventing traffic from going up and down the
canyon. U.D.O.T. was called. The avalanche forecaster, Dave
Medara (phonetic), arrived at the scene, evaluated it. The
Alta Town Marshal also came to the scene to help coordinate
traffic. Mr. Medara continued down the road, came back and
noticed that all of the traffic was stopped because a front-end
loader was removing the snow from the road. It was at that
time that the second avalanche occurred and then knocked
everyone off the road.

This is a situation where U.D.O.T. did not trigger the
avalanche. It wasn't an avalanche control effort. It was an
unexpected situation. And if called to testify, the avalanche

forecasters would tell you that White Pine Chute 3 and 4 are
the ones that most infrequently run. So, the fact that White
Pine Chute ran, Number 4, ran that particular day, and ran
across the road was completely unexpected.

We think there is a strong policy argument in addition to
the immunity aspect of this case which is quite clear that we
can't be second-guessed in making these decisions. The first
avalanche occurred at 2:19, the second one occurred at 2:44.
There was a very quick time frame here in which to respond and
to make an evaluation. At all times when Mr. Medara was on the
road, he was evaluating the avalanche situation. He was trying
to coordinate and decide whether or not the whole road should
be closed; and that would mean, in essence, locking people up
at Snowbird and Alta and preventing people from the coming up
the canyon. And that decision isn't made lightly. It has to
be made after considering the conditions and consulting with
other individuals like Alta and Snowbird to advise them of
what's going to be happening.

We just think that immunity is quite clear here. We know
that Mr. Draper has argued about the special relationship, and
I will allow him to address that and then respond to that, Your
Honor. But we don't believe a special relationship argument is
necessary when immunity is quite clear and stated in the Code.
Do you have any questions?

THE COURT: Thank you.

1 MR. RICHARDS: Good morning, Your Honor.
 2 THE COURT: Good morning.
 3 MR. RICHARDS: I just want to point out a couple of things
 4 in the memoranda that I think are important. I think first of
 5 all it's real important that the Plaintiff has accepted as true
 6 all of the facts that are alleged and set forth in the
 7 memoranda Alta submitted. For purposes of summary judgment,
 8 those are deemed as accepted by both sides. And under those
 9 set of facts, it's pretty obvious, I think, that the injury
 10 occurred during the management of a natural disaster. The
 11 Plaintiff supplied the definition of a natural disaster from
 12 the Comprehensive Emergency Management Act from the State, and
 13 that Act basically says that if an injury occurs -- and it
 14 defines a "natural disaster" as a situation "threatening to
 15 cause injury or property damage as a result of a natural
 16 phenomenon." And I can't imagine something more on point in
 17 this case. As Ms. Steinvort, indicated, there is absolutely
 18 no indication that the avalanche was caused by humans. It
 19 certainly wasn't triggered through U.D.O.T.'s effort. And they
 20 have the ability and responsibility to control avalanche danger
 21 in Little Cottonwood Canyon. I should say, except for the
 22 resorts, themselves, just to be fair. Obviously this didn't
 23 happen on resort property.
 24 The first avalanche occurs. Dave Medara, U.D.O.T.'s
 25 avalanche forecaster responsible for the whole canyon meets

1 Alta's Deputy Town Marshal at the scene where this avalanche is
 2 partially blocking the road. They talk about what to do. Dave
 3 Medara says, "I'm going to go down canyon. I need to take a
 4 look at a couple more slide paths. See what's going on." What
 5 was going on was unusual. And I don't know if you read some of
 6 the attachments, but it was an unusual March day inasmuch as it
 7 was really warm and there was no wind. And so you had a lot of
 8 a wet slabs letting go, apparently. Regardless, Mr. Medara
 9 wants to go down canyon and take a look at a couple of
 10 additional slide paths to see what's going on.
 11 Kevin Payne (phonetic), Alta's Deputy Town Marshal, says,
 12 "Fine. Let's call a front-end loader in from Snowbird and get
 13 this debris off the road," because traffic was trying to make
 14 its way around this using one lane and he saw the danger in
 15 that. And while Medara went down, Payne continued to allow one
 16 lane to go and stop it, allow the other lane to go until the
 17 front-end loader arrived ten or fifteen minutes later. The
 18 front-end loader went to work and in a matter of about ten
 19 minutes had most of the snow pushed off.
 20 Kevin Payne gets a phone -- gets a radio call when the
 21 loader was on its last load saying, "This is Dave Medara. I'm
 22 down at the bottom. I've assessed conditions in the canyon. I
 23 think where we've got traffic stopped. I'm a little nervous
 24 about it. How much longer do you have?" And Mr. Payne said,
 25 "We are on our last load." He said, "Fine." Within seconds,

1 the second avalanche lets go. And hits, obviously, the traffic
 2 including the Plaintiff's vehicle.
 3 But I think what's important from that is to understand
 4 this all happened within 34 minutes. And in that 34 minutes,
 5 you have the guy responsible for avalanche control in the whole
 6 canyon and the marshal on duty that met at the scene, came up
 7 with a plan, decided what was best and implemented it. And I
 8 guess if they would have had another 30 seconds, there may not
 9 have been a problem. But those are the kind of decisions that
 10 government entities have to make during a natural disaster.
 11 You don't delegate those type of decisions. And I think as a
 12 policy matter hindsight, Monday morning quarterbacking of those
 13 type of decisions is easy to do but it's darn hard for those
 14 people that have made the decisions to -- to see those Monday
 15 morning quarterbacking calls at the time they are trying to
 16 prevent loss of human life and property damage.
 17 The other -- the other issue we raise was the natural
 18 condition of public land. And, again, I can't think of
 19 anything more natural on public land than a naturally occurring
 20 avalanche in Little Cottonwood Canyon in the middle of a
 21 wilderness area. And I think both of them are directly on
 22 point.
 23 I am going to sit down. If the Court has any questions,
 24 I'd be happy to address them.
 25 THE COURT: Thank you, Counsel.

1 Mr. Draper.
 2 MR. DRAPER: Your Honor, if I might?
 3 THE COURT: You may.
 4 MR. DRAPER: (Inaudible) statute we are dealing with, Your
 5 Honor.
 6 Your Honor, for us to lose this motion today, the Court
 7 must find that this avalanche was a natural disaster, was a
 8 disaster. I mean, we have -- if the Court finds that it was,
 9 we lose. And I want you to -- if you would, Your Honor, please
 10 look at Subparagraph A of the statute I've given you, 53-2-102,
 11 "Natural Phenomenon." It specifically identifies an avalanche
 12 as a natural phenomenon.
 13 Now, can a natural phenomenon become a disaster? If you
 14 look up at Number 2, it tells you that:
 15 "A 'disaster' means a situation
 16 causing or threatening to cause
 17 widespread damage, social disruption or
 18 injury or loss of life or property
 19 resulting from attack (and there it is)
 20 'natural phenomenon'."
 21 So, an avalanche in and of itself does not create a
 22 disaster. It has to fit within the parameters of that
 23 definition.
 24 Now, if Mr. Blackner, who's sitting back there in the back
 25 of this courtroom, were driving up that highway, up that road

1 and an avalanche wiped him out, there's no case. There is
2 absolutely no claim. Because we would agree it is -- it is not
3 a natural condition because that's a static circumstance.
4 That's snow. That's the Grand Canyon. That's things like
5 that. But the natural phenomenon is something dynamic that
6 happens in nature without anyone's involvement. And we agree,
7 we are not claiming that they started this avalanche or that
8 they had direct cause of putting the avalanche into motion. If
9 Mr. Blackner were driving up the canyon, an avalanche wipes him
10 out, there is no case.

11 Well, why is this such a good case? Well, the reason is,
12 Your Honor -- is that the avalanche that took out Mr. Blackner
13 is not the avalanche that they were cleaning up. And that's
14 the critical distinction.

15 What did the avalanche that they were cleaning up cause?
16 It doesn't even fit the definition of a disaster. The one they
17 were cleaning up was not threatening to cause widespread
18 damage, social disruption or injury, of loss of life or
19 property. It was snow on the road. And it wouldn't have any
20 more of a consequence than if there had been a nasty car
21 accident up there on the highway. They don't call it a
22 disaster because there is a car accident. It still requires
23 traffic to move. It requires people directing traffic and
24 managing that aspect of it.

25 So, we have an event that takes place. We have a natural

1 phenomenon which in and of itself means nothing. And they are
2 cleaning it up. They are not under any definition, any stretch
3 of the definition, dealing with a disaster.

4 Now, they did create a disaster. These guys stopped
5 traffic right under White Pines Chute Number 4. What did they
6 say? I heard her say, "completely unexpected." There are
7 signs all up that road, everybody is aware of them, about
8 avalanche danger, and no stopping or standing. They had every
9 opportunity to stop these cars at some other place. They chose
10 to stop them there. And if the Court will indulge me with
11 maybe somewhat of a silly analogy but, I think, on point, let's
12 use the Grand Canyon. Let's suppose there's an accident right
13 along the side of road that goes along the Grand Canyon. And
14 it is a car accident. And they have traffic control. And the
15 crazy traffic officer is directing people to go off the edge of
16 the Grand Canyon. Now, this is as absurd as stopping somebody
17 in an avalanche zone, I agree. But, you know, like lemmings,
18 these cars just keep plunging over the side. And then they
19 come in and argue immunity because it is a natural phenomenon
20 or a natural condition. "We're exempt from immunity (sic)."
21 The issue here is proximate cause. And the cause of
22 Mr. Blackner being wiped out and stopped and parked there is
23 because he was instructed and told to do so.

24 Now, he's at the bottom of the canyon driving up that
25 road, and Mr. Medara is in a U.D.O.T. vehicle driving up the

1 road. He's got the radio. They have been talking about what's
2 happening with the avalanche up the hill that they are dealing
3 with. And then he drives right on up and parks his vehicle
4 right where they are cleaning up. He gets out of his vehicle.
5 Mr. Blackner gets out. All these people are out looking at
6 this avalanche cleanup thing.

7 And all of a sudden "run." So, he makes a dive for his
8 car, and, of course, he's wiped out along with several other
9 people.

10 Your Honor, I want it to be really understood, I don't in
11 any way expect somebody, the State of Utah, the City of Alta,
12 anyone, to be responsible for something that just naturally
13 occurs. And this same avalanche could have gotten
14 Mr. Blackner, this very same avalanche, Mr. Blackner, under
15 different circumstances and there is no case. But where he's
16 stopped right there and they are not in the process of cleaning
17 up a disaster and they even directed him -- we are dealing with
18 an issue of instructional -- putting -- placing the public in
19 harm's way. Now, that's not an immune function under any
20 stretch of the imagination. And for the Court to rule in favor
21 of their motion, they must -- Your Honor must determine that
22 they were in the process of cleaning up a disaster. And where
23 is -- the slightest indication? The only damage and injury was
24 one -- you know, the accident -- the avalanche that followed
25 thereafter.

1 I don't think any of the other exceptions that they've
2 claimed, exemptions from immunity, fly. For purposes of this
3 motion, the Court must consider negligence, that there was
4 negligence and is there immunity? That's the basis of their
5 motion.

6 And so, Your Honor, I think that -- unless you have any
7 questions, that's the nuts and bolts of where this -- where the
8 law, I think, sits on this thing. The only thing I regret is
9 not having filed my own motion for the Court to determine that
10 under the facts as we know them and the affidavits submitted,
11 that this was not a disaster. This avalanche was not
12 threatening to cause widespread damage, social disorder,
13 injury, loss of life, et cetera. I mean -- my final comment,
14 Your Honor: If you look at I-15, what a mess that is. Every
15 time there is a accident on I-15, do we determine that that's a
16 disaster? I mean, everyone colloquially will say, "Hey, man,
17 that's a disaster up there on the freeway." But legal
18 definition? You know, and that's -- that's traffic at its
19 worst. You have an accident or event that affects a few people
20 in an isolated circumstance, and they have the ability to
21 control it but choose not to, in fact, to control it
22 incompetently by placing people under an avalanche chute. Then
23 there is responsibility and not immunity.

24 THE COURT: Thank you, Counsel.

25 MS. STEINVOORT: Just one thing, Your Honor: I think that

1 these photographs help illustrate why we perceive it as a
 2 disaster. And I provided these to Counsel before. The first
 3 photograph I'll (Inaudible) is -- they are both -- as you can
 4 see, the snow on the top of the photograph is the first
 5 avalanche. And it's hard to explain and express how fast this
 6 happened. Mr. Medara was at his post at Alta, he gets the call
 7 at 2:19 and he responds. It is our position that it is a
 8 natural condition, that it was unexpected, that -- Mr. Madera
 9 was caught in the same avalanche, went off the side of the
 10 road. It wasn't as if he was deliberately putting people in
 11 harm's way. The traffic was not flowing, Your Honor, it was
 12 slowed down. And the question was: "How do we get this
 13 cleared up in order to get people moving along?" And the
 14 decision was made to bring up the front-end loader and clear
 15 the traffic. And, of course, now we all say, "Well, gosh, wish
 16 we hadn't done that." But at the time it seemed to be the most
 17 prudent, practical thing to do, rather than having people
 18 slipe-sliding back and forth. The same group of people would
 19 have been sitting under this traffic chute. Maybe it wouldn't
 20 have been Mr. Blackner directly. It could have been another
 21 individual. There's certainly about nine statements from
 22 people who all went off the side of the road who experienced
 23 it. It was unexpected. It was a natural condition. We are
 24 entitled to immunity as a result of that. And the legislature
 25 has made that decision. We cannot go back and second-guess

1 efforts that are made to control an avalanche or to manage an
 2 avalanche situation that occurs unexpectedly on a Saturday
 3 afternoon.
 4 THE COURT: Thank you, Counsel.
 5 MS. STEINVOORT: Thank you.
 6 THE COURT: Anything more you (inaudible).
 7 MR. RICHARDS: Just real briefly. Thank you.
 8 I'm not sure that Mr. Draper was actually saying that a
 9 natural phenomenon can't be a disaster under this statute. I
 10 think he -- I think that is what he is saying --
 11 MR. DRAPER: That is what I'm saying. It can be
 12 (Inaudible) --
 13 MR. RICHARDS: -- which eliminates epidemics, droughts
 14 forest fires, avalanches, landslides, floods, storms, tornadoes
 15 and earthquakes. I'm left wondering what other sort of things
 16 could actually occur that aren't natural disasters. Maybe
 17 pestilence. Maybe we've forgotten pestilence. But I don't
 18 think that's the intent of the statute, is to say that a
 19 natural phenomenon can't be a natural disaster. I think that
 20 it's obvious that natural phenomena cause natural disasters all
 21 the time. And I think it is also important to point out that
 22 Mr. Draper's example of the car accident or directing traffic
 23 off the side of the Grand Canyon, it wouldn't fall under
 24 natural disaster. Because natural disasters, as according to
 25 this statute, are situations that threaten to cause injury to

1 lose -- injury to property or life because of four things
 2 only: Attack -- I am not sure what that is, but I'll leave it
 3 to the Court's imagination -- internal disturbance, natural
 4 phenomena or technological hazards. So, this statute doesn't
 5 make everything a natural disaster. It doesn't make the wreck
 6 by the side of the road a natural disaster. It makes
 7 widespread events that result from the natural phenomenon that
 8 threaten human life and threaten property a natural disaster.
 9 It might not have been the biggest natural disaster that's ever
 10 hit the state, but it certainly was a natural condition that
 11 threatened life and threatened property. Why else was Kevin
 12 Payne there directing traffic and letting one lane go at a time
 13 and not letting opposing lanes of traffic share one lane? I
 14 think it's pretty obvious that it is -- it's darn dangerous to
 15 do that. And that's why the Town Marshal at Alta, Deputy Town
 16 Marshal, was there trying to prevent people from running into
 17 each other so they weren't injured themselves.
 18 So, was it a huge natural disaster? No. Was it a natural
 19 disaster under this statute? You bet it was.
 20 That's probably all I need to add at this point. I did
 21 want to add, though: I don't think we addressed the natural
 22 condition of public land as being an avalanche. I mean,
 23 Mr. Draper says: "If you find this was a natural disaster, he
 24 loses." I think I agree with him. He also forgot to add: "If
 25 you find that an avalanche is a natural condition of the public

1 land, he also loses."
 2 Thanks.
 3 THE COURT: Thank you.
 4 The Court is going to grant the motion for summary
 5 judgment for both Department of Transportation and the City of
 6 Alta. It's the Court's view in examining the applicable
 7 statute that though there's certainly some basis for discussion
 8 -- and I think Plaintiff has done an excellent job of raising
 9 the other way of examining this, it's the Court's view that the
 10 intention as communicated by the legislature in this statute is
 11 that -- that the avalanche is a natural phenomenon, it is
 12 certainly a natural condition of the land and that the -- a
 13 disaster is a situation that causes widespread damage to
 14 property that results from natural phenomenon. And in the
 15 Court's view this sort of condition would follow in the
 16 description of "widespread damage" and would therefore be
 17 within the statute and would allow the immunity to the entities
 18 that are sued here as the Defendants.
 19 I'm going to ask Ms. Steinvoot if she would prepare an
 20 order to that effect.
 21 MS. STEINVOORT: I will.
 22 MR. RICHARDS: Your Honor, might I ask? Is the Court
 23 going to issue specific findings about loss of property or
 24 anything? I mean, I don't know if the Court is intending to do
 25 special findings or we are just going to go through

1 (Inaudible).
 2 THE COURT: I'd be comfortable, Counsel, if you would
 3 prepare findings that would find both the disaster and the
 4 natural condition law (Inaudible) Court indicated verbally.
 5 MR. DRAPER: Your Honor, my specific request in that
 6 regard is -- and I am not trying to argue on that, but in terms
 7 of defining the "natural disaster," the elements have to be met
 8 (Inaudible), with -- is the Court going to make specific
 9 findings on the elements of the disaster that's listed
 10 (Inaudible) --
 11 THE COURT: That's my intention. I've asked Counsel to
 12 prepare such an order and such findings. Thank you,
 13 Mr. Draper.
 14 (Hearing adjourned.)
 15
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 25

1 TRANSCRIBER'S CERTIFICATE
 2
 3 STATE OF UTAH)
 4) ss.
 5 County of SALT LAKE)
 6
 7 I, BILLIE WAY, CCT, do hereby certify that I am a
 8 Certified Court Transcriber in and for the State of Utah;
 9 That I reduced the proceedings aforesaid to print from
 10 videotape to the best of my ability;
 11 I further certify that I have no interest in the event of
 12 this action.
 13
 14 WITNESS MY HAND this 3rd day of November, 2000.
 15
 16 *Billie Way*
 17 (Signature) BILLIE WAY, CCT
 18
 19 BILLIE WAY is a Certified Court Transcriber
 20 working under my direction.
 21
 22
 23
 24
 25

Tab 2

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FILED DISTRICT COURT
Third Judicial District

OCT 16 2000

SALT LAKE COUNTY

By

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAUL BLACKNER,

Plaintiff,

v.

THE STATE OF UTAH, DEPARTMENT
OF TRANSPORTATION, and the
UTAH DEPARTMENT OF
TRANSPORTATION and CITY OF
ALTA,

Defendants.

SUMMARY JUDGMENT

Civil No. 990906368

Judge William B. Bohling

On Monday, August 28, 2000, the defendants' respective Motions for Summary Judgment were argued to the Court. The plaintiff appeared in person and was represented by Tad D. Draper, Esq. The defendant State of Utah, Department of Transportation was represented by Sandra L. Steinvoort, Assistant Attorney General, and the defendant City of Alta was represented by David C. Richards, Esq. The Court having reviewed memoranda filed, having heard the

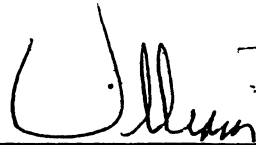
00280

argument of counsel, the court having accepted the facts submitted in the memoranda of the respective defendants as the plaintiff did not dispute them, and for good cause appearing, now and therefore, orders, adjudges and decrees as follows:

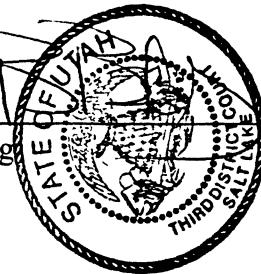
1. That the defendants respective motions for summary judgments are granted pursuant to U.C.A. § 63-30-10(11) and (13).

DATED this 16 ^{October} day of ~~September~~, 2000.

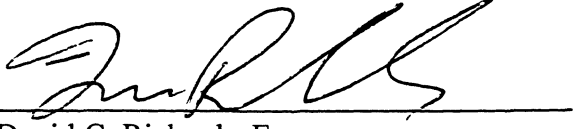
BY THE COURT



Judge William B. Bohling
District Court Judge



APPROVED AS TO FORM ~~AND~~
~~CONTENT~~


Tad Draper, Esq.
David C. Richards, Esq.
Christensen & Jensen